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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARVIN WASHINGTON,

4 Plaintiff,

New York, N.Y.

5 v.

17 Civ. 5625 (AKH)

6 JEFFERSON BEAUREGARD SESSIONS,
7 III, *et al.*,

8 Defendants.

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9
10 September 8, 2017
12:10 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge
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(Case called)

MR. HILLER: Michael Hiller from the law firm of Hiller, P.C., 600 Madison Avenue, New York, New York, 10022 on behalf of plaintiffs. Good morning, your Honor.

THE COURT: Introduce your colleagues.

MR. HILLER: To my right is Fatima Afia, also from the same firm; Lauren Rudnick, my partner from the same firm.

MR. BONDY: Good morning, your Honor. Joseph A. Bondy, B-O-N-D-Y, 1841 Broadway, New York, New York, 10023. Good morning.

THE COURT: Good morning.

MR. HOLLAND: Good morning, your Honor. David Holland, 155 East 29th Street, Suite 910.

MR. HILLER: And my associate has asked me to disclose to the Court that her admission is still pending but she has been approved for admission to the bar.

THE COURT: Very well. You may sit at counsel table.

MR. HOLLAND: Thank you.

MR. DOLINGER: Good afternoon, your Honor. Samuel Dolinger, Assistant United States attorney for the defendants. With me at counsel table is David Jones from our office.

THE COURT: Gentlemen, thank you.

This is a TRO. Why don't you make your motion, Mr. Hiller.

MR. HILLER: Thank you. May I use the lectern?

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1 THE COURT: Please.

2 MR. HILLER: Thank you.

3 THE COURT: Mr. Hiller, proceed.

4 MR. HILLER: Thank you, your Honor. This is
5 plaintiff's order to show cause for a temporary restraining
6 order and preliminary injunction.

7 THE COURT: Let me interrupt and note for the record
8 that I saw the parties informally in the robing room, and we
9 suspended the proceedings so that they could be recorded by
10 Ms. Utter and a record be made.

11 So, you are going to be repeating things you already
12 told me. I want you to know I understand that and accept that.

13 MR. HILLER: Thank you very much, your Honor.

14 THE COURT: You need to do it.

15 MR. HILLER: So, this is plaintiff's order to show
16 cause for a temporary restraining order and preliminary
17 injunction to suspend enforcement of the Controlled Substances
18 Act as it pertains to cannabis and as it pertains to one
19 plaintiff, Alexis Bortell. With the Court's indulgence, we
20 prefer to focus on the TRO relief today and would defer
21 consideration of the preliminary injunction to a later date, at
22 the Court's direction.

23 As for the TRO, we simply ask that the federal
24 courts -- the federal government --

25 THE COURT: Can you tell me that again?

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1 MR. HILLER: I said with the Court's indulgence, we
2 will focus on the TRO relief today and defer consideration of
3 the larger preliminary injunction to a later hearing date, at
4 the Court's direction.

5 THE COURT: I did that because the papers came in this
6 morning and I have had no time to review them.

7 MR. HILLER: I understand, your Honor. I just wanted
8 to make a record that I wasn't going to be arguing the full
9 preliminary injunction today.

10 As for the TRO, we suggest that the federal government
11 be temporarily restrained from enforcing the CSA -- the
12 Controlled Substances Act -- as it pertains to cannabis and as
13 it pertains to Alexis Bortell, so that she can travel back and
14 forth to Washington, D.C. for four days to participate in
15 certain lobbying days that have been scheduled by the National
16 Organization for the Reform of Marijuana Laws, also known as
17 NORML, which invited her specifically to participate in these
18 lobbying days which were scheduled with members of Congress.
19 Without this relief, Alexis Bortell cannot travel because she
20 needs her medical cannabis in order to prevent the recurrence
21 of seizures which, as explained by her physician, would end her
22 life. So, in a sense, she wants to travel to Washington and
23 she wants to take her medical cannabis with her so she can
24 lobby the government and meet with members of NORML, as well as
25 members of Congress.

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1 I should emphasize to the Court that one member of
2 Congress has already sent correspondence to Ms. Bortell's
3 parents and to Ms. Bortell inviting them to meet with him
4 because, as he said, and I am quoting now, the Congressman
5 believes that it is important that members of Congress be
6 afforded the opportunity to meet with you and to hear your
7 story and receive your perspective.

8 As I will get to in a moment, Alexis Bortell does meet
9 the requirements necessary for the issuance of the relief we
10 have requested. But before I do that, your Honor, I want to
11 tell you briefly about Ms. Bortell because I think it is
12 important for the Court to get the full picture.

13 She is 11 years old. When she turned 7, she developed
14 a condition called intractable epilepsy. That is an
15 uncontrollable form of epilepsy which results in dozens of
16 seizures per week, often several times a day. Because it is
17 intractable, it simply does not respond to traditional western
18 medications. She had over 35 medications, your Honor, and
19 medical cocktails and other treatments. None of it worked. As
20 a consequence, her physicians gave her parents a choice. She
21 could either have invasive brain surgery resulting in the
22 removal of portions of her brain tissue, or she could try
23 medical cannabis. Medical cannabis had, in fact, had some
24 success over the years so she moved with her family -- she
25 moved with her family to Colorado where she has been taking

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1 medical cannabis for the last 900 days, approximately. Your
2 Honor, even though she was having multiple seizures per day
3 while the doctors attempted to resolve her condition with
4 traditional western medicine, she has not had a single seizure
5 in the more than 900 days since she began a regimen of medical
6 cannabis. She has been transformed from a sick and debilitated
7 little girl into a very productive, normal girl who has the
8 ability to live a normal life, seizure free.

9 What is really unusual about this now 11-year-old
10 girl, and I say this from personal experience -- when I was 11
11 years old the last thing I was thinking about was going to
12 Congress, I was wondering whether or not the Giants were going
13 to win this Sunday -- but for Alexis Bortell she is not content
14 merely to save herself, she wants to advocate on behalf of
15 everyone else, including herself but of course everyone else,
16 so that they can benefit from the regimen of medical cannabis
17 that has saved her life. She has written a book, she has an
18 active Internet presence, she has got tens if not hundreds of
19 thousands of followers all over the world, she has spoken to
20 state legislature, testified at hearings. She raises money for
21 the hungry and for medical refugees who have moved to Colorado
22 but don't have the funds to support their families because they
23 can't maintain two residences. She wants everyone to know how
24 cannabis has changed her life. In many respects, your Honor,
25 Alexis Bortell is to medical cannabis what Malala is to

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1 literacy. She is literally the poster child for medical
2 cannabis. And so, it is against that background that we now
3 speak to you about the opportunity that this particular girl
4 have the opportunity to meet with representatives on Capitol
5 Hill. As I mentioned earlier, she cannot travel on a federal
6 roads, she can't travel by air, and she can't enter on any
7 federal lands.

8 Now, it is particularly troubling for her that both of
9 her parents are military veterans. Her father is a 100 percent
10 disabled military veteran and, as a consequence of that, she
11 would be entitled to receive certain veterans' dependent or
12 dependent veterans benefits which she cannot collect because
13 she can't go on to a military base. She needs her medical
14 cannabis with her at all times in the same way that some people
15 need a rescue inhaler as an asthmatic, or epi-pen if they have
16 an anaphylactic allergy. She needs it, and if she doesn't have
17 it she can have these seizures, so she can't go on these
18 federal lands.

19 So, she was invited by NORML, and as I mentioned
20 earlier, by members of Congress to speak to her, to speak to
21 her at this particular time. And I want to emphasize the
22 timing of this application is especially important. Right now
23 the Marijuana Justice Act is going to be introduced on Capitol
24 Hill. In addition, multiple pieces of legislation addressing
25 de-criminalization or de-scheduling of cannabis are under

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1 consideration right now. We are at the proverbial tipping
2 point, your Honor, where the government of the United States
3 needs to hear from people like Alexis Bortell but,
4 unfortunately, the government can't do so because all of the
5 people who need medical cannabis to survive are also the people
6 who do not qualify to be on federal lands.

7 So, when we talk about the three requirements I want
8 to speak to the first one which is, of course, irreparable
9 harm. This Court has found itself, irreparable harm is the
10 most important of the three prongs. And I want to emphasize
11 that the particular constitutional rights which we are talking
12 about are free speech, the right to petition the government for
13 redress of grievances, the right to travel, the right to
14 preserve one's life and to continue taking medication, I should
15 say, to preserve one's life, and certain substantive due
16 process rights under the Ninth Amendment and under the Due
17 Process Clause. Let me first address the First Amendment
18 issue, Judge.

19 I can imagine that someone might claim that
20 Ms. Bortell is not threatened with imminent irreparable harm
21 because she could just speak to someone on the telephone or
22 speak to someone on a video connection. Your Honor, I would
23 respectfully refer the Court to *Hodgkins v. Peterson*, 355 F.3d
24 1048, (2d Cir. 2014), in which the Court rules, "There is no
25 Internet connection, no telephone call, no TV coverage that can

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1 compare to in-person advocacy."

2 The United States Supreme Court, in addressing the
3 government's efforts to dictate how these people express
4 themselves and, in particular, what forms they use, the Court
5 specifically ruled in *Riley v. National Federation for the*
6 *Blind*, 487 U.S. 781, "The government, even with the purest
7 motives, may not substitute its judgment as to how people
8 should best express themselves."

9 Senator Booker recently called out Attorney General
10 Sessions and said I dare him to sit down and meet with the
11 families and look hem in the eyes and continue to pursue the
12 course of action he is taking. The point, your Honor, is in
13 person advocacy there is simply no substitute for it. There is
14 simply no substitute for it. And if you look at the particular
15 circumstances here I would like to add one additional nugget to
16 that and that is this: Members of Congress, when they want to
17 meet with someone like Alexis Bortell, will sit down with her.
18 They are going to want to introduce her to other members of
19 Congress, but if she is on a telephone line that is simply not
20 possible. And even if it were, it wouldn't be an in-person
21 connection. And a video feed can't be carried down the hall.
22 She needs to have the opportunity to meet with one member of
23 Congress after another because they need to hear from her and
24 most importantly she, as an American citizen, as a person of
25 the United States, has the fundamental, constitutional right to

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1 engage in in-person advocacy particularly if members of
2 Congress have requested her presence there. And so, that is a
3 fundamental right. And I should emphasize and should have done
4 so at the outset, any time someone is threatened with the
5 deprivation of a constitutional right as a matter of law, that
6 constitutes irreparable harm. So, I have articulated one
7 particular aspect of this, I now want to turn to the issue of
8 the right to travel.

9 Ms. Bortell cannot travel. If she were to travel,
10 Ms. Bortell would be subject to arrest, her parents would be
11 subject to the termination of their parental rights, and as a
12 consequence she is restricted in ways that other Americans are
13 not. In addition to that, your Honor, I would respectfully
14 refer your Honor to the Roe vs. Wade and Stenberg v. Carhart
15 cases. In those cases, the Supreme Court ruled that an
16 individual has a right to protect his or her own health and
17 life.

18 In all of the abortion rights cases the Supreme Court
19 has consistently ruled that under circumstances in which a
20 woman wants to have a third trimester abortion, even after
21 fetal liability, the Courts must afford that woman the
22 opportunity to take medication or to save a life in another way
23 by terminating that pregnancy because the right to preserve
24 one's life is paramount. Here, we are simply asking the Court
25 to recognize the same right, the right of Alexis Bortell to

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1 continue taking medication which, for the last almost three
2 years, has been preserving her health and her life.

3 And with all due respect --

4 THE COURT: What is the source of that right?

5 MR. HILLER: The source of the right, your Honor, is
6 found in both due process laws. The Due Process Clause
7 prevents the government from taking action that deprives
8 someone of life, liberty, or property without due process of
9 law. She is being deprived of the opportunity to preserve her
10 life. She is also being derived the opportunity, under the
11 liberty clause, for the maintenance of her health and to
12 preserve her health.

13 And I would emphasize to your Honor, if you would look
14 at the Stenberg v. Carhart case which we have cited in our
15 brief, if I may turn to that page briefly, the governing
16 standard requires an exception --

17 THE COURT: What is the case?

18 MR. HILLER: Stenberg v. Carhart, 530 U.S. 914 at page
19 931, decided in 2000.

20 The governing standard requires an exception where it
21 is necessary in the appropriate medical judgment -- in
22 appropriate medical judgment for the preservation of the life
23 or health of the mother, for this Court has made clear that a
24 state may promote but not endanger a woman's health when it
25 regulates methods of abortion.

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1 The point of the matter is, Judge, that whenever there
2 is a circumstance in which there are competing state versus
3 individual interests, the right of a woman, or in this case the
4 right of a 11-year-old girl to preserve her own life and her
5 own health, trumps whatever the government would like to do
6 here insofar as the Controlled Substances Act is concerned. It
7 would be one thing, your Honor, if Alexis Bortell were a drug
8 dealer, but she's not. She is using medical cannabis to
9 preserve and save her life, and that actually takes me to my
10 point concerning substantive due process with respect to the
11 rationale, or I should say the irrationality of the Controlled
12 Substances Act.

13 Your Honor, in order to meet the requirements of a
14 controlled substance Schedule I drug the government must
15 establish that there is a high potential for abuse, Judge no,
16 medical application whatsoever, no medical utility whatsoever,
17 and third, that it is so dangerous that it cannot be tested
18 even under strict medical supervision.

19 Well, your Honor, if you look at Exhibit 9 to our
20 papers you will see that the United States government has a
21 patent on medical cannabis and in that patent, your Honor, the
22 United States government makes a representation that it treats
23 Parkinson's disease, HIV-induced dementia, and Alzheimers
24 disease. It also serves as an effective neuroprotectant and
25 safeguard against diseases that oxidize within the body. This

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1 is the United States government.

2 Now, your Honor, you cannot have a patent under
3 Section 35 U.S.C. 101 unless you can demonstrate utility. The
4 United States government demonstrated that utility by obtaining
5 a patent by making representations to the United States Patent
6 & Trademark office that medical cannabis works, that it is an
7 effective treatment for disease. They also did this on the
8 international stage before the World Intellectual Property
9 Organization, and they obtained a patent in Canada with the
10 same representations that were made based upon the same
11 standard.

12 So, on the one hand the government of the United
13 States is saying that cannabis is so dangerous it can't be
14 tested under medical supervision and it has no medical
15 application whatsoever, while at the same time they obtained a
16 medical patent based upon the representation that it does
17 provide medical benefits.

18 The point I am making, your Honor, and this is one of
19 11 different instances where the government's position simply
20 cannot be reconciled with its own prior statements that the
21 statute itself is completely and totally irrational. So, I
22 have mentioned the first one, which is the patent in the United
23 States. I mentioned the second one which is the patent that's
24 been obtained on the world stage. The United States government
25 has licensed that patent, your Honor, to third-parties. The

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1 United States government is collecting funds based upon the
2 representation that cannabis has medical efficacy in direct
3 violation of the allegation that is a critical component of the
4 CSA, namely, that there is no medical application.

5 The United States government also has issued something
6 called the FinCEN guidance. The FinCEN guidance is issued by
7 the Bureau of the Department of Treasury. In the FinCEN
8 guidance the United States government gives advice to banks and
9 other financial institutions as to how to do business with
10 cannabis companies. So, the United States government is saying
11 on the one hand under the CSA that cannabis is so dangerous it
12 doesn't have any application and can't be tested, even under
13 strict medical supervision, and yet the United States
14 government at the same time is advising banks and other
15 third-party lending institutions how to do business with
16 cannabis companies. That simply makes no sense.

17 The United States government, in 1978, your Honor,
18 began something called the IND Program with respect to
19 cannabis. The IND Program -- I think it is called
20 Interventional New Drug Program -- pursuant to the IND program,
21 your Honor, the United States government gives cannabis to
22 patients for the treatment of disease. They have been doing it
23 for almost over 40 years, Judge. What is interesting about
24 that is a study that was conducted -- not a single one of those
25 persons has a single adverse impact that has affected their

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1 lives. Quite the contrary, they are on less medication than
2 they were on before.

3 If the United States government is going to take the
4 position that medical cannabis has no efficacy whatsoever, how
5 can they explain why they've been giving this drug -- again, by
6 the way, they're not giving it to a drug company to give to
7 these people, the United States government is giving the drugs
8 to patients through the IND Program. How can they do that if
9 it is so dangerous it can't be tested?

10 In February of 2015, your Honor, the United States
11 Surgeon General, America's chief health and medical officer
12 announced on CBS News that medical cannabis has medical
13 efficacy for the treatment of disease.

14 Your Honor, there have been 29 states --

15 THE COURT: You prove that by the efficacy in this
16 young girl's life. Because of cannabis administered in
17 Colorado which she could not get in Boston she has seen a
18 cessation of her seizures for a period of time. The question
19 is that Congress has declared this substance and the delegated
20 authority, something that should be forbidden. It has not
21 enforced that rule in various states that have made an
22 exception for medical marijuana but every now and then there
23 are noises that it will and presumably it does that because
24 there is an attitude, whether scientifically based or not, that
25 the use of cannabis by people, particularly young people, did

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1 cause addiction and serves as a pathway to more dangerous
2 drugs. I don't know if that is true or not but --

3 MR. HILLER: Your Honor, I can address that specific
4 issue, if I may.

5 The Drug Enforcement Administration, for decades, had
6 the very same language.

7 THE COURT: You don't know what my point was.

8 MR. HILLER: I'm sorry?

9 THE COURT: What was my point?

10 MR. HILLER: Oh. I thought you were saying that the
11 government has made this determination that it is a gateway
12 drug. I'm sorry. I thought you were finished. Forgive me.

13 THE COURT: Maybe you know the point. Maybe you know
14 the point, then I don't have to articulate it.

15 Where the government has said it is illegal and where
16 it has also said that there is use and utility but there has
17 never been a determination that it's okay for everybody, what's
18 the power of the Court?

19 MR. HILLER: What's the power of the Court in the
20 context of, in the context of the framework?

21 THE COURT: The law that says it is illegal and with
22 actions by the government to show that there is utility. The
23 fact that there is utility doesn't make it less illegal.

24 MR. HILLER: The fact is that the federal government
25 has acknowledged, in writing, that there is medical utility for

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1 cannabis.

2 THE COURT: Does not make it less illegal to
3 distribute it.

4 MR. HILLER: I think that may be true, your Honor, but
5 that doesn't make it -- let's put it this way. The
6 government's acknowledgment in writing that cannabis has
7 medical efficacy does render the statute unconstitutional
8 insofar as --

9 THE COURT: Why?

10 MR. HILLER: Because in order for cannabis to be a
11 Schedule I drug there needs to be a finding that it has no
12 medical efficacy, that there is no medical utility or
13 application whatsoever and that it is so dangerous, like heroin
14 and ecstasy, for example, that its mere testing even under
15 strict medical supervision, is too dangerous to try. That,
16 your Honor, is completely incompatible with the admissions that
17 the government has made. And when the government purports to
18 represent to your Honor and Judges like yourself that cannabis
19 is properly scheduled because it is too dangerous to test
20 because there is no medical -- because there is no medical
21 efficacy for it because it meets the Schedule I requirements
22 when in fact it's just the opposite, the federal government has
23 a patent alleging, claiming and representing that it does have
24 medical efficacy, that means that the United States government
25 is taking two positions that are irreconcilable.

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1 THE COURT: If there is medical benefit but there is
2 also danger, can there not be a law forbidding its
3 distribution?

4 MR. HILLER: The fact pattern that you just proposed
5 would mean that it cannot be a Schedule I drug, that it is
6 irrational as currently scheduled --

7 THE COURT: Schedule I drug can have no utility
8 whatsoever.

9 MR. HILLER: No medical utility whatsoever. And the
10 fact of the matter is that the United States government --

11 THE COURT: Does the government agree with that?

12 MR. DOLINGER: No, your Honor.

13 THE COURT: Okay. You will tell me later. I just
14 wanted to know.

15 MR. DOLINGER: Thank you.

16 MR. HILLER: We can go through the statute but it is
17 clearly in the statute. I will be interested to hear what
18 opposing counsel has to say.

19 Your Honor, in addition to the matters I mentioned
20 earlier, the United States Congress has repeatedly added riders
21 to all of its appropriations legislation to prevent the
22 Attorney General, Department of Justice, and the DEA from
23 enforcing the Controlled Substances Act as against medical
24 cannabis patients and medical cannabis businesses that are
25 acting in conformity with state law. What that means is the

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1 United States government is allowing people to use medical
2 cannabis notwithstanding that medical cannabis, according to
3 the Controlled Substances Act, is so dangerous it can't be
4 tested even under strict medical supervision.

5 There are of course the Ogden and Cole memorandum,
6 which I am sure your Honor is familiar with, in which the
7 United States government has discouraged any prosecutions
8 against people who are using medical cannabis in conformity
9 with state law. And by the way, your Honor, with 29 states and
10 three territories having some form of medical cannabis or
11 cannabis legalized, over 60 percent of the United States right
12 now has legalized cannabis, over 190 million people have access
13 to medical cannabis. It is absurd to suggest, as the
14 government may suggest, that cannabis is so dangerous that it
15 can't be tested safely even under medical supervision but 190
16 million people could be exposed to it every day.

17 Lastly, your Honor, I would refer your Honor to the
18 comments made by Congressman Gowdy and Congressman Connolly
19 during their recent hearings with the White House Policy Acting
20 Director. During those hearings Congressman Gowdy said: I
21 don't understand why cannabis is a Schedule I. It certainly
22 isn't treated as inherently dangerous, a dangerous substance
23 for which there is no medical value.

24 And Gerry Connolly of Virginia said: There was in
25 fact no empirical evidence to justify putting marijuana as a

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1 Schedule I drug 50 years ago.

2 Mr. Connolly also pointed out that the National
3 Institute for Drug Abuse, which helps set policy in Washington
4 said -- Congressman Connolly said, "nobody thinks NIDA is an
5 objective neutral place to go to look at the good, the bad and
6 the indifferent about marijuana. NIDA doesn't have that kind
7 of credibility.

8 And Congressman Gowdy responded after that and said it
9 would be helpful at some point to us to have some
10 consistency -- and this is the most important part -- or at
11 least to be able to explain why some drugs are Schedule I and
12 others are not.

13 Congressman Gowdy closed the hearing by pointing out
14 that it is imperative that we just make some common sense in
15 how cannabis is scheduled.

16 Members of Congress can't even explain it, Judge. I
17 am pointing out that the statute itself is completely and
18 totally irrational and we are going to deprive an 11-year-old
19 girl, who is a leader of this movement, to prevent her from
20 traveling for four days to Washington, D.C. where she will pose
21 harm to no one, where she will be invited as a guest to the
22 meet with members of Congress. The statute should have some
23 basis in reality, some basis in rationality, and the fact of
24 the matter is this one doesn't. We are talking about the loss
25 of a precious constitutional right.

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1 THE COURT: Does she know that she will be forbidden
2 to go on the airplane?

3 MR. HILLER: Yes.

4 THE COURT: How does she know that?

5 MR. HILLER: Her father told her.

6 THE COURT: What?

7 MR. HILLER: Her father told her.

8 THE COURT: That's not a legal answer.

9 MR. HILLER: No. You are asking me why --

10 THE COURT: Does she know that by traveling she will
11 be arrested?

12 MR. HILLER: No. She doesn't know that -- she can't
13 predict the future but she would know that she is violating the
14 law and she doesn't want to violate the law in order to make an
15 appearance.

16 THE COURT: She would technically be violating the law
17 in Colorado because federal law is enforced in Colorado.

18 MR. HILLER: She is complying with Colorado law. When
19 she steps foot on an airplane or on federal lands she is
20 violating federal law.

21 THE COURT: If she is taking marijuana in Colorado,
22 whether under a doctor's prescription or not, she may be
23 violating federal law because federal law is supreme over state
24 law.

25 MR. HILLER: Your Honor, you know, if I am attacking a

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1 perspective there is no denying the Controlled Substances Act
2 and the supremacy clause controls.

3 THE COURT: It is not that she is afraid of violating
4 the law. She wants --

5 MR. HILLER: She is in Colorado, your Honor, and as
6 someone who lives in Colorado she is protected under that
7 state's laws and she is obviously aware -- the family is aware
8 of the Cole memorandum, the Ogden memorandum, the FinCEN
9 Guidance, and of course the fact that 190 million people are
10 exposed to cannabis every day and the federal government at the
11 moment is precluded, under the Rohrabacher-Farr amendment, from
12 to devoting resources to the prosecution of people like her and
13 her family. So, right now, although it is illegal under the
14 Controlled Substances Act, she is not in legal jeopardy as long
15 as she stays within the confines of Colorado. But, in effect,
16 she has become a prisoner of Colorado. And she can't go
17 everywhere in Colorado because she can't go on her parents'
18 military base and she can't go to any of the four National
19 Parks in Colorado. She's never seen Yosemite, she's never seen
20 any National Park, for that matter.

21 THE COURT: So you are saying there is a memorandum in
22 the Department of Justice that says that the government will
23 not prosecute a case of distribution of marijuana where there
24 is a license from the state involved and a prescription?

25 MR. HILLER: Not exactly the way you said it, your

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1 Honor, but if you look at Exhibit 11 is the Cole memorandum,
2 and the Cole memorandum specifically addresses this issue.

3 THE COURT: Wait a moment. Let me get it.

4 MR. HILLER: Sure.

5 THE COURT: Because of this memorandum -- is it still
6 operative?

7 MR. HILLER: It is.

8 THE COURT: It is not likely that she will be
9 prosecuted on an airplane.

10 MR. HILLER: It is not likely she will be prosecuted
11 in Colorado.

12 THE COURT: Or in an airplane moving from Colorado.
13 Or even anywhere else because Colorado's laws entitle her to
14 full faith and credit.

15 MR. HILLER: Your Honor, it is my understanding that
16 if she travels on airplanes regulated by the federal government
17 she would be subject to prosecution. But let's assume for the
18 purpose of discussion --

19 THE COURT: You don't know that.

20 MR. HILLER: Let's assume for the purpose of
21 discussion that your Honor is a hundred percent right and she
22 is completely safe on an airplane -- I'm not sure I agree but
23 let's assume that's the case -- your Honor, the minute she
24 steps on federal land -- the Cole memorandum is inoperative on
25 federal land. She cannot go to Congress. So, even if she

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1 drove to Washington, D.C. using a circuitous route to only go
2 through state-legal cannabis states, she still would be subject
3 to arrest in Washington, D.C.

4 Then, your Honor, as long as you are looking at the
5 exhibit book, I would encourage you to look at the next
6 exhibit, Exhibit 12. The very first paragraph to me makes the
7 case more strongly than anything I could say but it really
8 talks about how the United States government is telling banks
9 and financial institutions how to do business with cannabis
10 companies. If cannabis is illegal, then they're committing a
11 crime when they do this. And obviously we are not accusing the
12 government. I am just saying the United States government is
13 encouraging bank and financial institutions to do business with
14 cannabis companies and specifically tells them how to do it.

15 THE COURT: Why don't I hear Mr. Dolinger.

16 MR. HILLER: Your Honor, before I close out I do need
17 to make a record on the second and third prongs of the
18 injunctive relief and I will be as brief as I can.

19 THE COURT: Do that. What is the first factor?

20 MR. HILLER: The first factor is irreparable harm.
21 And, as I mentioned earlier, it is our position and the cases
22 are consistent on this that the threatened deprivation of a
23 constitutional right constitutes irreparable harm as matter of
24 law. In this instance we have articulated a number of
25 constitutional rights including the rights of free speech, the

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1 right to petition the government for redress of previous --

2 THE COURT: You made your point.

3 MR. HILLER: Second is substantial likelihood of
4 success on the merits. Failing that --

5 THE COURT: You made that point too.

6 MR. HILLER: Okay. I do want to emphasize one point
7 as part of that that I didn't mention earlier and that's this.
8 I already talked about the fact that in-person advocacy, as a
9 matter of law, is a distinct aspect of a First Amendment right
10 but what I didn't talk about is the tradeoff. If you look at
11 opposing counsel's papers, you will see -- we were served with
12 an 18-page brief shortly before this hearing began -- opposing
13 counsel talks about the fact that she could just leave her
14 cannabis behind and cites papers to make that point. But, your
15 Honor, it is well established in the Simmons case, for example,
16 United States Supreme Court case entitled Simmons, and I can
17 give you the citation in a moment, in which the Supreme Court
18 said you cannot require a person to sacrifice one right in
19 order to exercise another. And here, that's exactly what the
20 U.S. Attorney's office is asking our client to do. He is
21 asking her to either leave her medicine behind in order to
22 travel to Washington and lobby her officials, or she can stay
23 in Colorado and lose the constitutional right to engage in
24 in-person advocacy with respect to an issue that's important to
25 her and which she has been invited to speak about.

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1 THE COURT: What is the third factor?

2 MR. HILLER: Balancing of equities. Balancing of
3 equities weighing in favor of the injunction, your Honor. I
4 should say balancing of equities determining whether or not it
5 would be -- which party would experience greater harm. In this
6 case, the denial of the application here would deny our client
7 her opportunity to exercise her First Amendment rights, as I
8 mentioned earlier, at this critical point in time when the
9 government is considering the very legislation that could
10 change her life. By contrast, your Honor, there is absolutely
11 no harm whatsoever to the government.

12 THE COURT: You are appeased, right. I have got all
13 of these points. Let me hear Mr. Dolinger.

14 MR. DOLINGER: Thank you, your Honor.

15 MR. HILLER: Thank you, your Honor.

16 MR. DOLINGER: Your Honor, Samuel Dolinger for the
17 defendants.

18 To start with the point of likelihood of success on
19 the merits, plaintiff's counsel spent much of his time
20 discussing whether there is a rational basis for the regulation
21 of marijuana under Schedule I of the Controlled Substances Act.
22 There is binding Second Circuit precedent on this point; United
23 States v. Canori, 737 F.3d 181 (2d Cir. 2013) relies on a 1973
24 Second Circuit case which holds that Congress' scheduling of
25 marijuana in Schedule I was a rational exercise of its power.

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1 THE COURT: You are going too fast. Make your point,
2 please. Take your time.

3 MR. DOLINGER: Thank you, your Honor.

4 THE COURT: Start again. What are you telling me?

5 MR. DOLINGER: Your Honor, there is binding precedent
6 from the Second Circuit recognizing that there is a rational
7 basis for Congress' 1978 determination to schedule marijuana in
8 Schedule I of the Controlled Substances Act.

9 THE COURT: What about the point that Mr. Hiller made
10 that there are firm examples of federal recognition of the
11 utility of marijuana for medical purposes?

12 MR. DOLINGER: Your Honor, if you look at the
13 structure of the Controlled Substances Act, Congress passed a
14 law in 1970 and it made an initial determination of where drugs
15 should be scheduled on a total of five schedules. It was
16 Congress that classified marijuana as a Schedule I drug in 1970
17 and, as a result, the possession, use, etc. of marijuana became
18 a criminal offense.

19 As the Supreme Court recognized in United States v.
20 Oakland Cannabis Buyers' Cooperative which is 532 U.S., this is
21 page 492, the Attorney General did not place marijuana into
22 Schedule I.

23 THE COURT: Is this in your brief?

24 MR. DOLINGER: Yes, it is, at page 3, your Honor.

25 While the Controlled Substances Act does provide a

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1 method for the updating of schedules --

2 THE COURT: It would be helpful if you had a table of
3 cases in your brief.

4 MR. DOLINGER: I'm sorry, your Honor. I had to finish
5 the brief this morning. We got plaintiff's 60-page brief last
6 night at around 10:30.

7 THE COURT: How about supplementing or submitting a
8 table of contents?

9 MR. DOLINGER: Certainly, your Honor. I would be glad
10 to do so.

11 THE COURT: So, which case are you citing? Oakland
12 Cannabis?

13 MR. DOLINGER: Oakland Cannabis Buyers Club; and the
14 following sentence, your Honor about halfway down the page
15 concerning the fact that Congress was the entity that placed
16 marijuana into Schedule I. And so, while the CSA does provide
17 for this periodic updating of the schedules --

18 THE COURT: Congress was not required to find that a
19 drug lacks an accepted medical use before including the drug in
20 Schedule I.

21 MR. DOLINGER: That's right, your Honor.

22 THE COURT: What if the drug has an accepted medical
23 use and therefore the argument is made that there is no
24 rational basis for the law?

25 MR. DOLINGER: Your Honor, there is a process whereby

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1 the Attorney General can be petitioned by an individual to seek
2 a change in the scheduling of a drug, a rescheduling into a
3 different schedule. There have been a number of these
4 petitions made as the Supreme Court recognized in Gonzalez v.
5 Raich, which is cited on that same page. Such petitions have
6 been made repeatedly and there is a process for review of the
7 denial of such petitions in the D.C. Second Circuit and so
8 cited again on page 3 of our brief. The D.C. Circuit, in 2013,
9 upheld the denial of such a petition, in 2013, finding that the
10 factual findings in support of its determination not to
11 reschedule the drug were supported by substantial evidence, and
12 those findings reasonably supported the agency's final decision
13 not to reschedule marijuana.

14 THE COURT: Stop for a moment.

15 MR. DOLINGER: Yes.

16 THE COURT: I want to ask a question of Mr. Hiller.

17 Of course this case is not precedent. Is that binding
18 on me? But the D.C. Circuit, particularly on administrative
19 agency cases, is particularly persuasive. How should I relate
20 it to this case?

21 MR. HILLER: I will tell you why, your Honor.

22 You look at your complaint, we have actually put a
23 list of every petition that's ever been filed in connection
24 with the rescheduling of drugs. It takes nine years, on
25 average, for a petition to be considered by the DEA. Very

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1 often, in order to get the DEA or the Attorney General to
2 consider anything, people have to sue, to bring writs of
3 mandamus, to force the government to take action. Nine years
4 is too long.

5 THE COURT: Why is that relevant?

6 MR. HILLER: The relevance is that in order for
7 some -- what I am hearing opposing counsel suggest is that
8 there is due process because the petitioning process does
9 provide people with notice and opportunity to be heard.
10 However, if you have to wait nine years to find out whether you
11 can take life saving medication, it ceases to be effective due
12 process.

13 THE COURT: Well, that doesn't mean every case is nine
14 years, it only means an average is seven or eight years, as you
15 say. But here, the D.C. Circuit held --

16 MR. HILLER: Which case? I'm sorry. Which case are
17 you talking about?

18 THE COURT: The one in footnote 1 of page 3 of
19 defendant's brief, Americans for Safe Access v. DEA, 706 F.3d
20 438. The D.C. Circuit, at page 449 and 442 held that after
21 review of the record, that the agency's factual findings,
22 presumably about marijuana, are supported by substantial
23 evidence; and second, that reasonably support the agency's
24 final decision not to reschedule marijuana.

25 So, what do I do on a TRO? What do I do with these

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1 findings?

2 MR. HILLER: Your Honor, that was a litigation to
3 challenge administrative determination. The procedural
4 limitations of such a call are limited to the record that's
5 been placed before the DEA. It is not consistent with the
6 record we have placed before you today and that's a point I
7 really think is important to emphasize. The evidence I have
8 put before you today --

9 THE COURT: How do I know that? How do I know that?
10 There is no record.

11 MR. HILLER: I can only tell you -- I mean, I have
12 looked at these cases. I have not seen any case, and opposing
13 counsel is free to disagree with me but I haven't seen any case
14 that has martialled the facts in evidence as we have. I don't
15 see any case talking about the patents, FinCEN.

16 THE COURT: So, because of the priority of your
17 presentation I should disregard the decision of the District of
18 Columbia Circuit in 2013.

19 MR. HILLER: Number one, it is based upon different
20 facts; and number two, it is based upon a different procedure.
21 That case was simply seeking to overturn a DEA termination, the
22 standard for which is simply substantial evidence.

23 THE COURT: And you are telling me to give you an
24 exemption?

25 MR. HILLER: I am saying to your Honor that the record

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1 here is entirely more substantial than the record that was
2 present for Americans for Safe Access.

3 THE COURT: Thank you.

4 Continue

5 MR. DOLINGER: Your Honor, if I may respond, what
6 counsel is asserting in the complaint here is that the
7 scheduling of marijuana is irrational, and under the rational
8 basis standard there is a strong presumption of validity for
9 the law. The burden is on the plaintiff to show that every
10 conceivable basis which might support it is negated and,
11 furthermore, your Honor, this is at page 7 of our brief, I am
12 citing Beach Communications v. FCC, 508 U.S. at 315; a
13 legislative choice is not subject to courtroom fact finding and
14 may be based on rational speculation unsupported by evidence or
15 empirical data.

16 The plaintiffs here are attempting to get the Courts
17 to not only re-review the D.C. Circuit's determinations on an
18 administrative petition which already it is not before the
19 Court but to sit as a sort of super-legislature above Congress
20 and to redetermine its policy judgment as to --

21 THE COURT: Do you think that the distinction that
22 Mr. Hiller draws is a valid distinction?

23 MR. DOLINGER: I'm not sure which distinction that is,
24 your Honor, in terms of the evidence presented.

25 THE COURT: He said his record is much superior.

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1 MR. DOLINGER: Well, your Honor, the issue with --
2 plaintiff's position is that the DEA -- I'm sorry, the D.C.
3 Circuit case was decided on a substantial evidence standard. A
4 rational basis case, it just requires a single rational basis
5 without any evidence. So, it does seem to me that accepting
6 that case as persuasive authority there must be a rational
7 basis, and that's even beyond the fact, your Honor, that we
8 have Second Circuit precedent which is binding, holding that
9 there is a rational basis for the scheduling.

10 THE COURT: What case is that?

11 MR. DOLINGER: That is the case I cited before, your
12 Honor, it is United States v. Canori, C-A-N-O-R-I, and let me
13 get you a cite from the brief.

14 At page 5 of the brief, your Honor, this is in the
15 paragraph at the bottom, the Second Circuit has "upheld the
16 constitutionality of Congress' classification of marijuana as a
17 Schedule I drug." That is citing a 1973 Second Circuit case,
18 United States v. Kiffer from which a quotation continues on to
19 the next page which rejects the theory that plaintiffs are
20 advancing here.

21 So, in light of --

22 THE COURT: So, I put it to Mr. Hiller, how do I deal
23 with these Second Circuit cases in the context of a TRO?

24 MR. HILLER: Your Honor, the 1973 case occurred before
25 the patents the United States government took out, before the

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1 FinCEN guidance was issued, before the IND program was started,
2 before the U.S. Surgeon General.

3 THE COURT: So I don't follow it because the facts
4 have changed?

5 MR. HILLER: Well, your Honor, what I am saying is
6 that if -- let me put it to you this way. Opposing counsel has
7 said that any rational basis will do, any rational connection.
8 Your Honor, that is not the law. The United States government
9 cannot pretextually --

10 THE COURT: My first point is that as a District Court
11 Judge I have to follow Second Circuit precedent. Shall I hold,
12 in granting your TRO, that Canori and Kiffer are no longer the
13 law?

14 MR. HILLER: As it pertains to the claims in this
15 case, yes, and that's because the facts have changed.

16 THE COURT: How long do you think it would take before
17 the Second Circuit reversed me?

18 MR. HILLER: The facts have changed, Judge. That's
19 the key. In 1973 it was before the United States government
20 announced to the world that medical cannabis is a thing.

21 THE COURT: You are going to have to make a record of
22 that.

23 MR. HILLER: Pardon me?

24 THE COURT: You are going to have to make a record of
25 that. On a TRO I am not able to depart from Second Circuit

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1 precedent.

2 MR. HILLER: Your Honor, hold on one second, please?
3 I'm sorry.

4 (counsel conferring)

5 MR. HILLER: My colleague is making sure I emphasize
6 this point.

7 THE COURT: You have made the point, it is your basis
8 point.

9 MR. HILLER: The government has to believe its own
10 argument.

11 THE COURT: Things have changed.

12 MR. HILLER: The government no longer believes the
13 argument it made in 1973 that persuaded the Second Circuit to
14 issue the decision upon which opposing counsel is asking you to
15 rely.

16 THE COURT: The patent examiner is no longer of that
17 belief, perhaps, but that doesn't mean that the Attorney
18 General is no longer of that belief.

19 MR. HILLER: I think that may very well be true but,
20 your Honor, the standard not what the Attorney General
21 believes.

22 THE COURT: I take your point. I am giving you a
23 tactical reason why I cannot give you a temporary restraining
24 order, that without a record that powerfully shows that the
25 facts have changed from the Second Circuit precedence, I am

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1 committed to follow Second Circuit precedent.

2 MR. HILLER: I understand your Honor's point. I would
3 say, though, if you are looking for the powerful evidence to
4 which you just referred, I would respectfully ask that you
5 review exhibits 9, 24, 10, 11, 12, and 13. That is the
6 compelling, overwhelming evidence that the government,
7 notwithstanding able counsel's efforts here today, doesn't
8 believe what he is saying.

9 THE COURT: 9 is the patent.

10 MR. HILLER: 9 is the patent.

11 THE COURT: So that's the opinion of a patent
12 examiner.

13 MR. HILLER: No, no. I don't mean to interrupt, your
14 Honor, but that's not the opinion of the patent examiner.
15 That's the opinion of the United States government. The United
16 States government, in order to obtain this --

17 THE COURT: No, it is not. No, it is not. Well, you
18 are saying that because the United States Department of Health
19 and Human Services has made this observation that it is binding
20 on the Attorney General as well.

21 MR. HILLER: I am saying it is binding on the
22 government.

23 THE COURT: No, it is not. No, it is not. Estoppel
24 is not running against the government.

25 MR. HILLER: I am not suggesting estoppel, your Honor.

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1 THE COURT: Yes, you are.

2 MR. HILLER: I am saying the United States government
3 doesn't believe --

4 THE COURT: Yes, you are.

5 MR. HILLER: I can also point to Exhibit 24, and in
6 Exhibit 24, by the way, at beginning of page 30 --

7 THE COURT: Page 12. 12 is an effort by the
8 Department of the Treasury, which has the certain jurisdiction
9 with regard to financial crimes, to accommodate the law to
10 what's going on advancing in the states. It doesn't
11 necessarily mean that the attorney general is bound to the
12 proposition that Schedule I is an appropriate classification of
13 marijuana at this particular point in time.

14 MR. HILLER: And I guess, your Honor --

15 THE COURT: Exhibit 24, again, is the patent.

16 MR. HILLER: The Exhibits 10 and 11 are from the
17 Justice Department, Judge. But I would respectfully, with all
18 due respect, disagree with the Court that the standard is what
19 the Attorney General, who happens to be sitting in that office,
20 believes. If the United States government is repeatedly taking
21 the position that cannabis provides medical benefits to those
22 who take the drugs, then it is irrational for the federal
23 government at the same time to enforce a law based upon the
24 premise that it doesn't have any medical benefit.

25 THE COURT: I am not able, Mr. Hiller, in the context

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1 of the TRO, on papers that just came in to me, to issue a TRO.
2 You may be able to make your point in a more persuasive way in
3 the context of a full record and in a hearing on a preliminary
4 injunction, which in this case would be consolidated with a
5 trial itself, but at this point in time I just don't have a
6 record to justify departure from what has been the law up to
7 now.

8 MR. HILLER: Your Honor, would there be any
9 possibility for the Court to reserve decision on this so that
10 you have the opportunity to review the other exhibits that I
11 haven't had a chance to speak about? I don't want to take all
12 day or your entire calendar talking about each exhibit in our
13 exhibit book but would --

14 THE COURT: They go to the same point.

15 Let me put this to you, Mr. Dolinger.

16 MR. DOLINGER: Yes, your Honor.

17 Your Honor, if I may direct your attention, I think
18 the analysis in a case from the Western District from the
19 Sierras.

20 THE COURT: Let me point you. I am looking for the
21 Supreme Court decision that dealt with the way it classified,
22 here.

23 The Attorney General can conclude a drug in Schedule
24 I, only if the drug has no currently accepted medical use in
25 treatment of the United States, that's a quote I find from the

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1 exhibits in Mr. Hiller's presentation, that a currently
2 accepted medical use of treatment; second, has a high potential
3 for abuse. Well, nothing has been said about that and that's
4 part of it. Third, it has a lack of accepted safety for use
5 under medical supervision. And the points that Mr. Hiller made
6 with regard to the first point are relevant to the third point
7 as well, but there has to be conjunction with all three factors
8 in order to --

9 MR. DOLINGER: Your Honor, respectfully --

10 THE COURT: -- for the Attorney General.

11 MR. DOLINGER: Your Honor, for the Attorney General to
12 place it in that schedule, but as the Supreme Court
13 recognized --

14 THE COURT: So, what happens if it just has a high
15 potential for abuse but the other two factors don't stack up?

16 MR. DOLINGER: Then, your Honor, my understanding if
17 that is the finding of the Attorney General, then the Attorney
18 General could not schedule the drug in Schedule I. But as the
19 Supreme Court recognized, it was not the Attorney General who
20 placed marijuana into Schedule I, it was Congress when it first
21 passed the law.

22 THE COURT: That's why Mr. Hiller is saying there is
23 no rational basis for Congress to have done so.

24 MR. DOLINGER: Understood, your Honor, but --

25 THE COURT: Maybe there was at the time, but he is

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1 arguing that the law is unconstitutional as applied because the
2 Attorney General has not seen fit to take into consideration
3 what we have learned about the medical utility of marijuana.

4 MR. DOLINGER: There are two points to that.

5 The first is in this same citation from the Supreme
6 Court case, Congress was not required to find that the drugs
7 that it placed in Schedule I meet all of those requirements
8 beforehand. Congress could make whatever determination of
9 which the scheduling, the rescheduling process set out for the
10 future and so there was no necessity. As the Supreme Court
11 recognized in this Oakland Cannabis Buyers' cooperative case
12 that is cited on page 7, Congress was not required to find that
13 a drug lacks an accepted medical use before including it in
14 Schedule I. Again that's 532 U.S. at 492.

15 So, Congress' determination that marijuana should be
16 included in Schedule I must be upheld under rational basis for
17 review.

18 THE COURT: Where is that case?

19 MR. DOLINGER: That is at the middle of page 3 of our
20 brief, your Honor.

21 THE COURT: Page 7.

22 MR. DOLINGER: I'm sorry, Your Honor?

23 THE COURT: You said something on page 7.

24 MR. DOLINGER: This case, your Honor, is on page 3. I
25 was referring to another case that was decided more recently.

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1 But, the Supreme Court's description of the statutory
2 scheme makes clear that when Congress placed drugs into the
3 drug schedules, this was not subject to the scheduling
4 requirements that are placed upon the Attorney General's later
5 movement of a drug to a different schedule and, once again,
6 that process is subject to a petition and the review of those
7 petitions go to the D.C. Circuit which in 2013 deny the
8 petition and found that there was a substantial basis for the
9 findings that the petition should be denied.

10 THE COURT: In a word, where you have the decisions of
11 the Supreme Court, consistent decisions of the Second Circuit,
12 and consistent decisions of the D.C. Circuit all holding that
13 there was a rational basis for the law and it will be enforced
14 even though, as the Raich case put it, there can be some
15 medical utility.

16 MR. DOLINGER: Even though there is ongoing debate
17 about --

18 THE COURT: Raich I held that there is no medical
19 necessity exception for marijuana under the CSA even when the
20 patient is seriously ill and lacks alternative avenues for
21 relief.

22 MR. DOLINGER: And, your Honor, I think that also what
23 may be helpful to the Court is there is a list of cases that we
24 have placed on page 6 of the brief starting with United States
25 v. Christie, a Ninth Circuit case from 2016, which not only

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1 rejected the argument that the Schedule I classification of
2 marijuana was arbitrary and lacking rational justification, but
3 also holding that legal, medical, and scientific developments
4 do not undermine the central holding of the 1978 Ninth Circuit
5 precedent that it relied on.

6 So, that is alternately the precise argument that
7 Mr. Hiller is making here.

8 THE COURT: So, that's the first factor that I have to
9 consider. With the second factor that he can't succeed, there
10 is no substantial likelihood of success. Talk to me about the
11 first factor, the irreparable harm.

12 MR. DOLINGER: Irreparable harm, your Honor, here we
13 are here on a request for a temporary restraining order so that
14 the plaintiff can travel to D.C. to attend a meeting with
15 Congress people. That's what he has represented to the Court.
16 And she also represents that she believes that she would be
17 subject to enforcement, a greater enforcement if she boards a
18 plane than she would while sitting in her home state of
19 Colorado. Assuming for the sake of this argument that that is
20 correct, she still has not shown any irreparable harm here.
21 What we are talking about is a meeting that the plaintiff has
22 not asserted cannot happen by other means. She concedes in her
23 papers that she could communicate with these legislators via
24 other methods. She has not asserted that she could not go back
25 to have these same conversations at another point if she

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1 succeeds on the merits of her claims. And --

2 THE COURT: I think Mr. Hiller's point is that the
3 intensity of the lobbying process requires the martialing of
4 opinions and impressions at particular points and that her
5 physical presence is extremely important and efficacious
6 because it is a chance to meet additional congressmen and would
7 press the congressmen with the utility of the marijuana
8 treatment that has, in effect, saved her life.

9 MR. DOLINGER: Understood, your Honor.

10 THE COURT: So, although she could make those
11 arguments remotely using, for example, TV screens and feeds,
12 she has no mobility and it is not easy to get other people to
13 watch those screens, those who are assembled to listen, will
14 listen and watch, but those who need to be persuaded are not
15 likely to be there. That's their argument.

16 MR. DOLINGER: Well, your Honor --

17 THE COURT: It is a good argument.

18 MR. DOLINGER: If you take a look at page 14 of our
19 brief --

20 THE COURT: I mean, I could be subject to an estoppel
21 because I don't allow -- in conferences, to be here remotely I
22 require them to be present because of the importance of face to
23 face contact.

24 MR. DOLINGER: Again, your Honor, respectfully, there
25 is simply no constitutional right to this type of face to face

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1 interaction.

2 THE COURT: We have covered that. That's substantial
3 likelihood of success.

4 MR. DOLINGER: I'm sorry, your Honor?

5 THE COURT: We have covered that by the substantial
6 likelihood of success. The question now is irreparable harm.

7 MR. DOLINGER: Well, so there is the Supreme Court
8 case law that holds that the Constitution does not grant
9 members of the public a right to be heard by public bodies
10 before making a policy decision. So, to the extent that the
11 plaintiff is arguing that she is irreparably harmed by the
12 denial of such a right, that right does not exist and so it
13 really, I think, collapses the inquiry.

14 THE COURT: She has a right to petition Congress.

15 MR. HILLER: That's correct your Honor, and she has --

16 THE COURT: She has a right to travel. Both of those
17 rights, we are told, are threatened to be curtailed by the fear
18 of arrest and the fear of deprivation, and the legitimate fear
19 of deprivation of a constitutional right can qualify as
20 irreparable damage.

21 MR. DOLINGER: It can, your Honor.

22 THE COURT: See, Mr. Hiller? I did hear your
23 argument.

24 MR. HILLER: Thank you, Judge.

25 MR. DOLINGER: In this case, your Honor, we do not

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1 have a conflict between two different constitutional rights.
2 The plaintiff concedes in her papers that she is able to travel
3 and she is also able to meet members of Congress, as long as
4 she does not bring with her, her medically prescribed
5 marijuana. The Controlled Substances Act does not regulate
6 travel, it does not regulate the ability to meet with --

7 THE COURT: Yes, but she is under -- it is the
8 Hobson's choice. If she doesn't have the marijuana, I am
9 told -- again, there is no record of this, I haven't had a
10 chance to cross-examine the doctor or the plaintiff -- but I am
11 told that if she doesn't have her marijuana on hand, she can go
12 into a seizure and that would be terrible.

13 MR. DOLINGER: Your Honor, even if that is the case,
14 the Courts have considered whether a medical necessity
15 exception exists in the Controlled Substances Act. The Supreme
16 Court rejected that position. That was also in United States
17 v. Oaklan Cannabis, but --

18 THE COURT: That's not a substantial likelihood of
19 success.

20 MR. DOLINGER: I'm sorry, your Honor?

21 THE COURT: It is not a substantial likelihood of
22 success.

23 What you are telling me is that the balancing of the
24 equities, because of the improbability of success and the
25 existence of alternative, even though less efficacious methods,

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1 of petitioning Congress in exercising speech, are such as to
2 cause me to deny the TRO at this point. That's really your
3 point.

4 MR. DOLINGER: Your Honor, we believe there is no
5 irreparable harm here.

6 The plaintiff is presenting an argument that there is
7 a Hobson's choice, I understand that argument, but for instance
8 if you look at the holding in Raich, the Supreme Court's
9 holding, the Supreme Court upheld in Raich the Congress'
10 determination that marijuana -- excuse me, your Honor -- that
11 Congress, under the commerce power, could regulate even the
12 interstate cultivation and use of marijuana under the Congress'
13 power.

14 In Raich, the Court noted that one of plaintiff's
15 physicians -- this is in a footnote at the bottom of page 8 --
16 believed that foregoing cannabis treatments could cause her
17 patient excruciating pain and could very well prove fatal. On
18 remand, the Ninth Circuit considered whether there could be a
19 substantive due process right to use medical marijuana and it
20 determined that there was no such right.

21 So, even where necessary, according to the plaintiff's
22 physician for medical use, and I can give you a cite to that,
23 your Honor, it is 500 F.3d 850 cited on page 13 of our brief,
24 the Ninth Circuit, the cannabis -- history of marijuana use and
25 regulation in the United States and rejected the claim that the

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1 right to use medical marijuana is fundamental and implicit in
2 the concept of ordered liberty applying the standard from
3 Washington v. Glucksberg, a 1997 Supreme Court case.

4 More recently, that was a 2007 Ninth Circuit case but
5 there have been several more recent cases that also hold that
6 there is no fundamental right to use medical marijuana. There
7 was an August 30th, 2017 case from the Western District of
8 Virginia that made that holding.

9 THE COURT: I think I have got your points.

10 MR. DOLINGER: And so, your Honor, the point that we
11 are trying to make here is we understand the plaintiff's
12 argument that this drug is medically necessary for her but it
13 is not a Hobson's choice, legally speaking. The plaintiff is
14 not being forced to choose between two constitutionally
15 protected activities.

16 THE COURT: Okay. Thanks.

17 MR. DOLINGER: Would you -- I'm sorry. May I be heard
18 on the points of the public interest and the balancing of the
19 hardships?

20 THE COURT: Well, public interest can go both ways.
21 The public interest and enforcing the laws is a clear interest
22 of the United States.

23 MR. DOLINGER: Yes, your Honor.

24 THE COURT: And the public interest of allowing
25 individuals, where necessary, the use of marijuana for medical

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1 purposes can also be said to be a strong public interest. And
2 it is a matter of weighing and I think I can do the weighing.

3 MR. DOLINGER: I think the one point I would add, your
4 Honor, is that under the plaintiff's formulation of the TRO
5 that she brings to the Court, any party, any individual who has
6 such a medical prescription for marijuana in a state where it
7 is regulated and legal under state law could get just this type
8 of order from any Court if they assert a right to travel.

9 THE COURT: You are arguing not a federal law and not
10 in the way that the law establishes. I catch the point.

11 MR. DOLINGER: And ultimately --

12 THE COURT: Let me hear from Mr. Hiller again and then
13 I will rule.

14 MR. DOLINGER: Thank you, your Honor.

15 MR. HILLER: I will try to be brief, Judge.

16 THE COURT: Yes, you will be brief, because it is 20
17 after 1:00.

18 MR. HILLER: Mr. Dolinger said in response to one of
19 your questions Congress can make whatever determination it
20 wants on the CSA. I wrote it down when he said it. Congress
21 can't do that.

22 THE COURT: No, there has to be rational basis for it.

23 MR. HILLER: There has to be a rational basis but I
24 would take it one step further, your Honor. Since we are
25 talking about fundamental rights, the right to free speech and

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1 the right that you articulated earlier and the right to
2 preserve one's life, not the right to use cannabis, the right
3 to preserve one's life, those are fundamental rights.

4 THE COURT: She preserves her life by staying in
5 Colorado. You are saying it is a travel issue. It is not a
6 preservation of life because she can stay in colorado to save
7 her life.

8 MR. HILLER: Then she has to sacrifice her rights to
9 free speech.

10 THE COURT: Or travel. I got it.

11 Anything new, Mr. Hiller?

12 MR. HILLER: Yes. Because it implicates those
13 fundamental rights, either free speech or preserve --

14 THE COURT: You said that already.

15 MR. HILLER: That means strict scrutiny should be
16 considered applicable here because it is not just a rational
17 issue anymore if it is impinging upon a fundamental right. And
18 so, I would make that first point.

19 The second point, your Honor, that I would like to
20 make, is that opposing counsel talked about Raich and medical
21 necessity. I would emphasize, your Honor, we are not
22 articulating medical necessity claims here, we have claims
23 under the Constitution.

24 The last point I will mention is that to frame the
25 constitutional right here, that is the plaintiff's job, not

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1 opposing counsel's. And we are talking about the fundamental
2 right, we are talking about the right of an individual who has
3 been treating successfully with life saving medication, the
4 right to continue to use that medication. That is the issue
5 that is being sacrificed if she has to stay in Colorado.

6 THE COURT: Not in this case. You are advocating the
7 change of a law and let's focus on that.

8 Okay, got it all. Just give me a couple minutes.

9 (Pause)

10 THE COURT: Mr. Hiller, when did your client become
11 aware that this was a lobbying day?

12 MR. HILLER: August 31st, Judge.

13 THE COURT: That's when she was aware?

14 MR. HILLER: That's when she was invited to
15 participate.

16 THE COURT: Who invited her to Congress?

17 MR. HILLER: The first person to invite her was a
18 member of NORML, the founder of NORML. And then she was
19 invited to speak with Congressman Lou Correa a few days ago and
20 another person, another senator.

21 (Pause)

22 THE COURT: The motion for TRO is denied.

23 There are four factors that have to be shown: The
24 plaintiff will suffer irreparable harm if the temporary
25 restraining order is not granted, that she has a substantial

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1 likelihood of success, that the equities balance out much in
2 her favor, and that the public interest supports a TRO. I
3 can't find those because the law is against me if I were to
4 find them and the record has not been adequately developed to
5 show such a change in the underlying facts as to make a
6 precedence in applicable.

7 As to irreparable harm, is this a vital moment of such
8 a nature as not to wait before a full hearing and development
9 of the record? I think not.

10 I understand the importance of time in a lobbying
11 process. It is the same as, in a way, the making of a deal or
12 an argument to a jury. The moment is exceedingly important.
13 The psychology of presenting the case to a person who will
14 command a great deal of sympathy is very important as well. It
15 is also very important to be able to come and speak but
16 opportunities are not unique. Opportunities come and go and
17 the chance of moving Congress at this particular time with this
18 particular bill is speculative. It is much better to have a
19 full record so that the Court can decide intelligently as
20 possible. In the meantime, there are opportunities to present
21 views.

22 Effectively, there can be use of TV screens so that,
23 in effect, the plaintiff is present with Congressmen who come
24 to see those screens are screens and with those who are not
25 there at the time, those views can be captured on cameras and

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1 be presented over and over again in all different ways.

2 My case of TDI, now in the Second Circuit,
3 demonstrated the utility of an ability to capture what is on
4 the screen and present it at other people's leisure and that
5 can clearly be done here. So, the idea of having to come at
6 this moment at this time to Congress and the denial of that, if
7 it is a denial, is not irreparable.

8 I can understand that the fear of arrest will induce a
9 person not to travel if the person legitimately fears that
10 there will be an arrest because of medical marijuana use on an
11 airline, even though pursuant to a valid prescription in the
12 state of origin. It may not be likely but it is a legitimate
13 fear, and the right to travel is an extremely important
14 constitutional right. I can understand that the concern about
15 not being sufficiently efficacious and persuasive because of
16 not being able to be physically present in front of a
17 Congressman is also an encouragement on the right of petition
18 and speech. But, given the importance of the law, the time has
19 been on the books and the overwhelming and consistent weight
20 for precedence in the United States Supreme Court and the
21 Second Circuit and particularly with agency law in the D.C.
22 Circuit, I can't say that the harm would be such as to be
23 irreparable.

24 It is clear that there has not been proof of a
25 substantial likelihood of success, although the documents

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1 presented by the plaintiffs presented in exhibits are
2 persuasive that there is now a medical use of the marijuana.
3 These are difficult issues requiring scientific proof and
4 opportunity to examine and to cross-examine in a way that
5 allows the Court to see the nuances supporting and invalidating
6 the law and it can't be done on a TRO and it can't be done on a
7 paper record.

8 With regard to the claim that the plaintiff will
9 suffer irreparable harm, the plaintiff must be examined in
10 terms of how the use of marijuana has prevented seizures and
11 there must be opportunity to cross-examine her position whose
12 affidavit is very important in supporting that.

13 And so, with other aspects, I cannot find a
14 substantial likelihood of success in overturning the clear
15 precedence against me and not following Supreme Court decisions
16 and Second Circuit decisions on this record that has presented
17 for the TRO. There must be a full record and the parties will
18 have to attend to it. I have told the parties informally and I
19 repeat it now that I will give a hearing to them whenever they
20 are ready.

21 One minute.

22 (Pause)

23 THE COURT: I have covered the first two factors of
24 irreparable harm and substantial likelihood of success.

25 As to balancing the equities, I am weighing an

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1 intangible and this will go right into the public interest as
2 well and that is the public interest, in enforcing the laws on
3 the books. Although laws can be declared invalid because of
4 conflict with the Constitution, here this is not a case of
5 invalidity on the face of things, it is the invalidity, the
6 invalidity of the body. The argument is that the law which may
7 have had substantial basis for it, rational basis for it,
8 remains, no longer has rational basis because of the advance of
9 medical science and use of marijuana and the slowness of the
10 Attorney General in dealing with this issue in a way that must
11 be applied shows an invalidity as applied to the law. But, in
12 the meantime the public interest exists in enforcing the law.
13 The law is on the books, the law is presumptively valid, it is
14 entitled to be enforced according to the way the public
15 prosecutors bring on cases. That equity is more important than
16 particular concerns of any individual. This does not involve
17 constitutional rights and the like because I have already
18 spoken about those, this is the balancing of the equities at
19 this particular point.

20 We have an interest in the validity of the
21 Constitution and applicability of the Constitution which is the
22 supreme law, but we have also a public interest in enforcing
23 presumptively valid laws and at this point in time the public
24 interest in the integrity of the laws and enforcement of the
25 laws is more important, in my opinion.

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1 So, for these reasons and because I will entertain
2 these issues in a more intelligent and nuanced way upon a full
3 record, and because I believe that with the cooperation of the
4 parties which I am sure will exist, we can bring this on for a
5 proper hearing at an early time. The motion for TRO is denied.

6 MR. HILLER: Your Honor, may I just be heard briefly?
7 Not to argue the issue.

8 THE COURT: Yes, Mr. Hiller.

9 MR. HILLER: And thank you very much for affording the
10 opportunity to present our arguments. I appreciate the Court's
11 time. I am sure I speak on behalf of everyone here, so thank
12 you.

13 With respect to a preliminary injunction hearing,
14 during our conversation prior to this hearing there was
15 discussion about engaging in some discovery in advance of that
16 preliminary injunction hearing which would also double as a
17 trial. Your Honor, we have proposed a discovery schedule to
18 the defendants.

19 THE COURT: The defendant wants to make a point that a
20 Rule 12 motion would be appropriate. It will not be
21 appropriate because the issue is really the Constitution, as
22 applied, and that requires a record.

23 MR. DOLINGER: Your Honor, if I may?

24 This is addressed at page 7 of our brief. On rational
25 basis for review, the government is not required to present any

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1 evidence or empirical data, Beach Communications v. FCC, a
2 Supreme Court case, and instead the burden is on the plaintiff
3 to present all of the necessary evidence to attack the
4 legislative arrangement to negative --

5 THE COURT: The plaintiff has done that amply. There
6 is a need now to cross-examine and examine on all the issues
7 that are relevant and to understand better the context of which
8 things are done.

9 MR. DOLINGER: May we have the opportunity to brief?

10 THE COURT: What?

11 MR. DOLINGER: To send letter briefs to the Court on
12 this issue, your Honor?

13 THE COURT: No. We are going to go into the facts.
14 We are going to develop a record. This case will go up to the
15 Second Circuit and the Second Circuit is entitled to a full
16 record on the matter.

17 MR. DOLINGER: Respectfully, your Honor, we believe
18 that the only record that is required is the allegations of the
19 complaint which will be accepted as true for purposes of the
20 Rule 12 motion.

21 THE COURT: Your motion is denied.

22 MR. DOLINGER: Thank you, your Honor.

23 MR. HILLER: If I may -- may I confer with opposing
24 counsel, briefly, just on the issue of discovery? Because we
25 talked about it previously and defendants were not willing to

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1 engage in any discovery --

2 THE COURT: When will you be finished?

3 MR. HILLER: With conferring?

4 THE COURT: No. Tell me when you are going to be
5 finished.

6 MR. HILLER: The proposal we have made is documents,
7 interrogatories and requests for admissions to be served within
8 seven days. Defendants are going to have to inform me of how
9 much time they need to respond to that, but we would be
10 prepared to proceed with depositions 30 days from today.

11 THE COURT: And how many do you need?

12 MR. HILLER: We would like -- well, we are going to
13 take the deposition of the parties and then, your Honor, in
14 response to the answers to interrogatories, we are going to
15 ascertain how many additional depositions we will need.

16 THE COURT: I tell you what you do. You confer with
17 each other this afternoon and you will submit, in writing,
18 jointly, a letter to me on Monday which will outline what you
19 have to do in as much detail as is feasible, and when you
20 conclude doing all of that I will then assign a hearing date.
21 Also, make a recommendation of how many days you need for a
22 hearing.

23 MR. HILLER: Thank you, Judge.

24 THE COURT: I don't need -- I don't think we need a
25 very long hearing, I think a half day would be sufficient

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1 because all I need, if there is to be live testimony, is where
2 this credibility factor involved, or some serious question that
3 requires me to hear people in making a judgment. But, I think
4 at that point in time you will have deposed each other, you
5 will be able to present different kinds of views, and we will
6 have just argument.

7 MR. HILLER: I understand, your Honor.

8 One last question, and I don't know if this may be
9 premature, but will the Court -- will Alexis Bortell be
10 permitted to come to New York and testify?

11 THE COURT: Say again.

12 MR. HILLER: Will Alexis Bortell, plaintiff, be
13 permitted to come to New York to testify in this court? It may
14 be a premature question but it says something.

15 THE COURT: I think you will have to go there.

16 MR. HILLER: I'm sorry?

17 THE COURT: She can come if she wants to but I don't
18 think she wants to.

19 MR. HILLER: I know she wants to, Judge.

20 THE COURT: I can't give an exemption.

21 MR. HILLER: I understand, Judge.

22 THE COURT: Maybe you can get some informal ruling
23 from the U.S. Attorney's office because it would be better for
24 her to come here and it may be she's interested in the trial
25 also to come here, but I can't give you an exemption. It is

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1 not in my hands.

2 MR. HILLER: Okay, your Honor. We will make that
3 effort, Judge. Thank you.

4 MR. DOLINGER: Your Honor, if I may just be heard
5 briefly on this?

6 The plaintiffs are requesting to --

7 THE COURT: Hit the podium, I can hear you better.

8 MR. DOLINGER: Thank you.

9 Plaintiffs are requesting to take the deposition of
10 the Attorney General of the United States and the administrator
11 of the Drug Enforcement Administration. They have told us that
12 they plan to send interrogatories, document requests, and
13 requests for admission. It seems that the plaintiffs are
14 intending to take the full discovery that they would be seeking
15 on the merits of their claim here and there is no longer any
16 urgency to their request for a preliminary injunction.

17 THE COURT: Why?

18 MR. DOLINGER: Because the lobbying days that
19 Ms. Bortell was seeking to come to Washington, D.C. for will
20 pass without her being able to --

21 THE COURT: Yes, but the need still remains.

22 MR. DOLINGER: Your Honor, respectfully, we hope to
23 cabin discovery because, for instance, the deposition of these
24 members of the administration has no relevance to --

25 THE COURT: You are going to make a motion for

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1 protective order, aren't you?

2 MR. DOLINGER: If your Honor will permit I guess we
3 will, your Honor.

4 THE COURT: Well, I don't have any choice. It is your
5 decision to make. If you think that some of the witnesses that
6 the plaintiff wants are not appropriate to be witnesses, you
7 will make a motion for protective order.

8 MR. DOLINGER: Thank you, your Honor.

9 THE COURT: Or what may be more efficacious, you
10 present your respective views in a letter addressed to me under
11 Rule 2E and I will give you a ruling which will cut down,
12 enormously, on the time.

13 MR. DOLINGER: We will, your Honor. Thank you.

14 THE COURT: It may be our ambition to have this done
15 in months will not be able to be satisfied. I will give you
16 time and my prioritized attention so there will no delay in the
17 point of view of the Court. Rule 65 requires me to give this
18 priority over all other matters except like matters and I have
19 no like matters at the time, so you take priority even over
20 criminal cases.

21 MR. DOLINGER: Thank you, your Honor.

22 THE COURT: All right.

23 Anything else? So, you give me a letter on Monday, if
24 you can. If not, you will tell me. If not, you have to call
25 up somebody and say we need another couple days.

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1 MR. HILLER: Thank you, your Honor.

2 MR. DOLINGER: Thank you.

3 THE COURT: Thank you, all.

4 I will be recessed until 2:15.

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